

There is no question that claimant has bilateral carpal tunnel syndrome and needs surgery. There is also no question that claimant's bilateral carpal tunnel symptoms began during the period that she worked for respondent. The only issue presented to the Judge was whether claimant's job duties as a receptionist either caused or aggravated that

condition. After considering the evidence, including various medical records from several doctors, the Judge determined claimant's injuries were compensable under the Workers Compensation Act.

At the preliminary hearing, claimant described how her job duties required intensive and repetitive use of her hands. But at that same hearing, claimant's department head, Ralph Dyro, testified that claimant's job did not require repetitive use of her hands. Claimant's testimony was somewhat corroborated by a September 2000 interoffice memorandum that requested a headphone be immediately provided to claimant due to the high volume of telephone calls and traffic that she had to handle.

The record lacks a definitive statement or opinion from a doctor that claimant's work either caused or aggravated the bilateral carpal tunnel condition. The Judge did not make a specific finding that claimant was a credible witness but such a finding is implied as the Judge determined claimant's work either caused or aggravated her injuries and granted claimant's request for benefits. Giving some deference to the Judge's findings, the Board likewise concludes that claimant's upper extremity injuries were either caused or aggravated by her work, which required hand-intensive activities.

Respondent and its insurance carrier presented the opinion of Dr. Victoria R. Masear, who examined claimant in September 2002 at respondent and its insurance carrier's request. Dr. Masear concluded claimant's bilateral carpal tunnel syndrome was not work-related as clerical activities such as typing, writing or holding a telephone would not cause such condition. At this stage of the proceeding, the Board is not persuaded that Dr. Masear's opinion is credible. The Board notes the doctor saw claimant only after consulting with a nurse that respondent and its insurance carrier had flown to Alabama for purposes of attending that examination. Additionally, according to claimant's testimony, among the various physicians she had seen for her hands, only Dr. Masear told her that the bilateral carpal tunnel syndrome was not related to her work.

Finally, a comment should be made regarding respondent and its insurance carrier's brief to the Board and its inclusion of statements, none of which were included in the transcript of the preliminary hearing or otherwise in the record, that the Judge allegedly made to claimant's counsel during a recess in the proceedings. The brief states, in part:

There is a major conflict associated with Claimant's alleged work tasks and the actual work tasks performed by her. In that regard, Respondent and Carrier argue that at the Preliminary Hearing, a second recess was ordered by the Administrative Law Judge (Prelim. Transcript page 57, line 20). During this recess, the **Administrative Law Judge advised counsel for Claimant that the credibility of Mr. Dyro was far more superior as he was much more believable, and that by him inquiring further into Claimant's job description, "he was doing his client**

a **dis-service** [*sic*].” Later in the same recess, the Administrative Law Judge warned counsel for Claimant that “he was shooting his own client in the leg.”¹

The Workers Compensation Act specifically provides that Board review is limited to the evidentiary record presented to the administrative law judge.² Accordingly, the Board may not consider the Judge’s alleged comments. There is little doubt those comments were inserted in respondent and its insurance carrier’s brief to influence this Board’s decision and to attack the credibility of claimant. And there is also little doubt that the most inexperienced counsel is aware that proper legal argument is based upon the facts included in the record and the reasonable inferences that may be drawn from those facts. More importantly, however, all attorneys are duty bound to conduct themselves professionally, remembering that their conduct affects how others perceive their credibility and professional integrity. It was improper to include the Judge’s alleged off-the-record comments in respondent and its insurance carrier’s brief. Therefore, those statements are disregarded.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

WHEREFORE, the Board affirms the January 17, 2003 preliminary hearing Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

c: Allan H. Bell and Jeffrey S. Bell, Attorneys for Claimant
Omid Amjadi, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation

¹ Respondent and its Insurance Carrier’s Brief at 7-8 (filed Feb. 11, 2003).

² K.S.A. 44-555c(a).

³ K.S.A. 44-534a(a)(2).